IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.B.KOSHY
&
THE HONOURABLE MR. JUSTICE K.P.BALACHANDRAN

THURSDAY, THE 28TH JUNE 2007 / 7TH ASHADHA 1929

R.C.Rev.No. 114 of 2005

AGAINST JUDGMENT DATED 18.12.2004 IN R.C.A.NO.123/2003 of RENT CONTROL APPELLATE AUTHORITY AND DISTRICT COURT,KOZHIKODE AND ORDER DATED 30.12.2002 IN R.C.P.NO.70/2000 ON THE FILE OF RENT CONTROL COURT & ADDL.MUNSIFF'S COURT,KOZHIKODE-I

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REVISION PETITIONER/APPELLANTS 1 TO 8/RESPONDENTS 1 & 3 TO 9:
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1. A.MOHAMMED BIVI, WIFE OF
   V.M.ABDUL RASHEED, AGED 45 YEARS,
   HOUSE WIFE, RESIDING AT Y.M.A.R. HOUSE,
   KEERANOOR VILLAGE, PALANI TALUK.

2. HAZARAMMAL, WIFE OF ABDUL RAHIM,
   AGED 62 YEARS, DO. DO.

3. MOHAMMED ISMAIL, SON OF ABDUL RAHIM
   RAWTHER, AGED 41 YEARS, RESIDING AT
   19/1870, PANCHAVADI HOUSE, MADHAVAN NAIR ROAD,
   CHALAPPURAM, KOZHIKODE.

4. MOHAMMED BASARUTHEEN, SON OF ABDUL
   RAHIM RAWTHER, AGED 39 YEARS, DO. DO.

5. SALIM BASHA, SON OF ABDUL RAHIM RAWTHER, DO. DO.

6. AHAMMED BASHA, SON OF ABDUL RAHIM RAWTHER, DO. DO.

7. NOORANISHAW, D/O.ABDUL RAHIM RAWTHER,
   AGED 43 YEARS, DO. DO.

8. SHAKILA BEEGUM, D/O.ABDUL RAHIM RAWTHER,
   AGED 37 YEARS, DO. DO.

BY ADV. SRI.S.VENKATASUBRAMONIA IYER(SR.),
SRI.V.GIRI AND
SRI.K.M.FIROZ

RESPONDENTS/RESPONDENT & 9TH APPELLANTS/PETITIONER & 10TH RESPONDENT:

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1. V.SUSHEELA KOVILAMMA,
   D/O.P.K.S.RAJA, AGED 73,
   RESIDING AT 5/1967, CHAMPASSERY HOUSING COLONY,
   ASOKAPURAM, KOZHIKODE.

2. V.M.ABDUL RASHEED, JAGGERY MERCHANT,
   REGISTERED UNDER THE INDIAN PARTNERSHIP ACT,
   AND HAVING ITS PRINCIPAL PLACE AT 12/1059,
   BIG BAZAAR, NAGARAM AMSOM DESOM, KOZHIKODE.

BY ADV. SRI.O.V.RADHAKRISHNAN (SR.)
SMT.K.RADHAMANI AMMA
SRI.ANTONY MUKKATH

THIS RENT CONTROL REVISION HAVING BEEN FINALLY HEARD ON 19/06/2007, THE COURT ON 28/06/2007 PASSED THE FOLLOWING:

J.B. KOSHY and K.P.BALACHANDRAN, JJ.

R.C.R. No. 114 of 2005

Dated this the 28th day of June, 2007

ORDER

Koshy, J.

Respondents 1 and 3 to 9 in R.C.P.No.70 of 2000 on the file of the Rent Control Court, Kozhikode are the petitioners in this revision. R.C.P.No.70 of 2000 was filed by the first respondent herein for eviction under section 11 (2) (b) and 11 (4) (1) of the Kerala Buildings (Lease and Rent Control) Act, 1965 (for short 'the Act'). The trial court granted eviction on both grounds and the same was affirmed by the Rent Control Appellate Authority. The scheduled premises were entrusted on lease by Ext.A1 kychit dated 19.11.1962 to one V.M. Abdul Rasheed and H. Muhammed Hussain, both deceased now. The original first respondent, namely, the first petitioner herein, is the widow of late V.M. Abdul Rasheed. One Meherunni Shaw, the original second respondent, was the widow of other tenant Mohammed Hussain. She did not challenge the order of eviction as the building was later

in occupation of V.M. Abdul Rasheed only. The contention of the landlord is that after the death of original tenants V.M. Abdul Rasheed and Mohammed Hussain, the original respondents 1 and 2, transferred possession and sublet the scheduled premises to respondents 3 to 9 in the R.C.P. The Landlord further contended that payment of rent has been defaulted by the respondents and that landlord is entitled to eviction on the grounds under section 11 (2) (b) and 11 (4) (i) of the Act. Original second respondent Meherunni Shaw, wife of one of the tenants, was the sister of V.M. Abdul Rasheed. Actually, in the tenanted premises, business was conducted by Abdul Rasheed. In the objection filed by respondents 1 and 3 to 9, it was contended that since the original tenants died issueless, the wife and sister of the tenant cannot inherent the property in its entirety. They are sharers and they are entitled only to fixed share mentioned under the Mohammedan Law of Succession and balance will go to residuaries and respondents 3 to 9 are not sub-lessees and they inherited part of the estate of Abdul Rasheed and, therefore, they cannot be evicted on the ground of sub-lease. There is no dispute to the legal position

that the legal heirs can also inherit the right of tenancy and if they are legal heirs, they cannot be called sub-tenants. The building was on lease from 1962 onwards. According to the landlord, rent was in arrears from 1989. The main question to be considered is whether respondents 3 to 9 are occupying the premises as legal heirs or as sub-tenants.

2. Section 11 (4) (i) of the Act reads as follows:

> "11. Eviction of tenants:- xx xx
>
> (4) A landlord may apply to the Rent Control Court for an order directing the tenant to put the landlord in possession of the building, -
>
> (i) if the tenant after the commencement of this Act, without the consent of the landlord, transfers his right under the lease or sub-lets the entire building or any portion thereof if the lease does not confer on him any right to do so:
>
> xx xx xx "

Both courts concurrently found that there was transfer of possession and the contention that they are also legal heirs were not accepted.

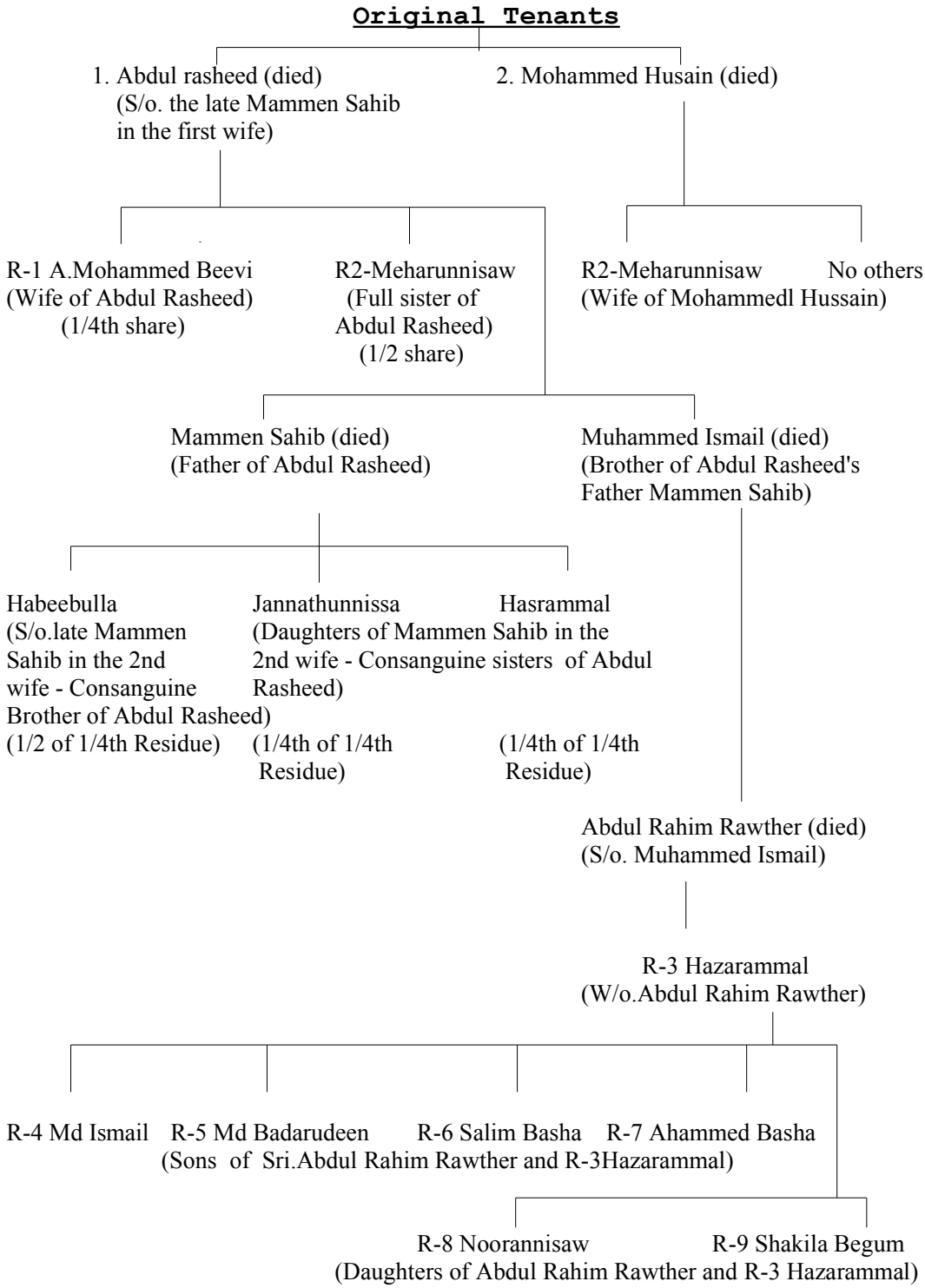
3. It is submitted that under the Hanafi Law, there are three types of heirs: (i) Sharers; (ii) Residuaries and (iii) Distant Kindred. Distant Kindred will inherit the property only if there are no sharers or residuaries. In Mohammedan Law by Mulla, it is stated as follows:

> "(1) 'Sharers' are those who are entitled to a prescribed share of the inheritance;
>
> (ii) 'Residuaries' are those who take no prescribed share, but succeed to the 'residue' after the claims of the sharers are satisfied;
>
> (iii) 'Distant Kindred' are all those relations by blood who are neither sharers nor Residuaries."

The estate of the deceased Muhammed Hussain has to be distributed after paying his funeral expenses, debt, etc. by allotting the 'sharer' (such of the relations as belong to the class of sharers) the fixed shares due to

them and the balance should be divided among the residuaries. If there are no named sharers or residuaries, it will go to the distant kindred. The widow's share is one-fourth. Full sister's share is one-half in the absence of child, child of a son, father, true grandfather's full brother. It is contended that first and second respondents will get only one-fourth shares and one-half shares respectively and the balance will go to respondents 3 to 9 who claimed to be residuaries as the children of the son of the paternal uncle as consanguine brothers. It is true that normally as per Mohammedan Law sharers will get only a fixed share. The question as to which of the relations belong to the class of sharers, residuaries or distant kindred are entitled to succeed to inherit depends on the circumstances of each case as per Hanafi Law of Inheritance. (See: Principles of Mohammedan Law, 18th Edition by Mulla, Chapter VII and Outlines of Mohammedan Law, 4th edition by Fayzee, A.A.A. and Commentaries on Mohammedan Law by B.R. Verma, Eighth edition). Here, first respondent widow (revision petitioner) will get only 1/4th of the estate of her husband as a sharer as he

died without any issues. She will not get any property as a residuary. Since Abdul Rasheed died without issues and the father and true grand father predeceased him, in the absence of full brother, 2nd respondent in the R.C.P. being full sister will get 1/2 of the estate as a 'sharer'. Only father and true grandfather can inherent the property both as 'sharer' and 'residuary' in certain circumstances. Father, true grandfather, daughter, son's daughter, full sister and consanguine sister may be converted into residuary in certain circumstances. For example, father gets 1/6 share where there is child or children of a son, but, when there is no child or children of a son, he will be considered as a residuary. It was argued by the counsel for the first respondent that, similarly, a full sister who became a sharer will be converted as a residuary when there is no full brother or higher residuary. Here, Abdul Rasheed died without any issues. Here, as full sister, second respondent in R.C.P. became a residuary in the absence of father true grandfather or his father. Family history is as follows:


Original Tenants
1. Abdul rasheed (died)
(S/o. the late Mammen Sahib
in the first wife)
2. Mohammed Husain (died)
R-1 A.Mohammed Beevi
(Wife of Abdul Rasheed)
(1/4th share)
R2-Meharunnisaw
(Full sister of
Abdul Rasheed)
(1/2 share)
R2-Meharunnisaw
(Wife of Mohammedl Hussain)
No others
Mammen Sahib (died)
(Father of Abdul Rasheed)
Muhammed Ismail (died)
(Brother of Abdul Rasheed's
Father Mammen Sahib)
Habeebulla
(S/o.late Mammen
Sahib in the 2nd
wife - Consanguine
Brother of Abdul Rasheed)
(1/2 of 1/4th Residue)
Jannathunnissa
(Daughters of Mammen Sahib in the
2nd wife - Consanguine sisters of Abdul
Rasheed)
(1/4th of 1/4th
Residue)
Hasrammal
(1/4th of 1/4th
Residue)
Abdul Rahim Rawther (died)
(S/o. Muhammed Ismail)
R-3 Hazarammal
(W/o.Abdul Rahim Rawther)
R-4 Md Ismail
R-5 Md Badarudeen
R-6 Salim Basha
R-7 Ahammed Basha
(Sons of Sri.Abdul Rahim Rawther and R-3Hazarammal)
R-8 Noorannisaw
R-9 Shakila Begum
(Daughters of Abdul Rahim Rawther and R-3 Hazarammal)

Even if the contention of the petitioners are accepted and respondent No.1 gets one-fourth shares and one-half will go to full sister and balance will go to residuaries, the revision petitioner cannot inherent as 'residuaries' due to presence of more proximate consanguine brothers 1 and 2, consanguine sisters. Consanguine sister takes as a residuary with consanguine brother, the brother, taking a double portion. The balance portion after distribution of fixed share to wife and full sister, will not go to respondents 3 to 9 as the family tree shows that there is a consanguine brother Sri.Habeebullah who takes 1/2 of the 1/4th of the residuary. The remaining half of the residuarly will goes to consanguine sisters namely, Jannathunnisaw and Hasrammal. Thus the residuary is exhausted. Respondents 3 to 9 are descendants of the paternal uncle of Abdul Rasheed and come under 102-third class heirs. They are therefore not eligible for any share as the entire share got exhausted by taking the shares by the sharers and residuaries under classes I and II. Since they have not inherited the property, transfer of possession to them is sufficient to attract section 11 (4) (i). We are of the

opinion that respondents 3 to 9, as already stated, are not legal heirs of the original tenants and, therefore, they are continuing in possession as legal heirs cannot be accepted. There is transfer of possession. The building was tenanted for more than four decades and, admittedly, after 1989, no rent was paid. Eviction under section 11 (2) and 11 (4) (1) was ordered by the rent control court and affirmed by the appellate authority.

In the above circumstances, we agree with the order of eviction passed by the authorities below and no grounds are made out for interference in revision. However, since respondents 3 to 9 were doing business in the tenanted premises for a long time, we are of the opinion that time can be granted for vacating the premises till 31st December, 2007 if they file an affidavit within one month from today before the execution court stating that they had deposited arrears of rent as on today before the execution court and will hand over vacant possession to the landlord on or before 31st December, 2007 and will continue to deposit amount equivalent to rent till they hand over vacant possession.

If the affidavit is not filed as directed, the landlords are free to execute the order of eviction. The amount equivalent of rent, if any, deposited as per the directions of this court can be withdrawn by the landlords (first respondent in the revision application).

J.B.KOSHY
JUDGE

K.P.BALACHANDRAN
JUDGE

vaa

J.B. KOSHY AND
K.P.BALACHANDRAN, JJ.

R.C.R.NO.114/2005

JUDGMENT

Dated:28th June, 2007